IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Chapter VIII, Rule 32(2) (b)

Description of Case

Date of decision: 07.08.2006

Second Appeal No. 644 of 2001
(Old No. 1889 of 1989)

Heera Lal
S/o Bhagwati Prasad
R/o Lala Bazar, Almora…….Plaintiff/Appellant

Versus

1. Shri Durga Datt Joshi (since deceased)
   S/o Indramani
1/1. Smt. Tulsi Devi W/o Sri Late Durga Datt Joshi
1/2. Shri Buddhi Ballabh Joshi
   S/o Late Sri Durga Datt Joshi
1/3. Shri Mohan Chandra Joshi
   S/o Late Sri Durga Datt Joshi
1/4. Shri Dinesh Chandra Joshi
   S/o Late Sri Durga Datt Joshi
   All R/o Mohalla Dilkot Patti
   Talla Tikhnur, at present
   Shopkeepers, Lala Bazar
   District Almora
1/5. Smt. Parwati Bhatt
   D/o Late Sri Durga Datt Joshi
   W/o Sri Pooran Chandra Bhatt
   R/o Tula Ram, Haripur, Gora Padaw
   Infront of Buland Factory, Haldwani.
   Nainital. ……Defendant/Respondents

Shri Rajendra Dobhal, learned counsel for the plaintiff/appellant.
Shri T.A. Khan, learned counsel for the defendant/respondent.

A.F.R. (Approved for Reporting)
Not Approved for Reporting

(Initial of Judge)

Date: 07.08.2006

Note: Bench Reader will attach this at the top of first page of the judgment when it is put up before the Judge for signature.

Judgment Reserved

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Shri T.A. Khan, learned counsel for the defendant/respondent.

Hon'ble Prafulla C. Pant, J.

This appeal, preferred under Section 100 of Code of Civil Procedure, 1908, is directed against judgment and decree dated 12.09.1989, passed in Civil Appeal No. 07 of 1989 by the then learned Civil

Judge, Almora, whereby appeal of defendant was allowed and judgment and decree dated 17.03.1989, passed by Munsif, Almora in civil suit No. 38 of 1969, for recovery of arrears of rent and eviction of the defendant from the premises in question, was set aside.

2. I heard learned counsel for the parties and perused the record.

3. Brief facts of the case are that plaintiff is the landlord and owner of shop situated in Lala Bazar, Almora, and the defendant Durga Datt Joshi was tenant on rent at the rate of Rs. 50/- per month. The house is a new construction of the year 1960-61 after the old building got demolished due to the fire. As such, U.P. (Temporary) Control of Rent and Eviction Act, 1947, was not applicable to the building. Plaintiff due to his alleged need for he disputed shop, determined the tenancy of the defendant by serving him a notice dated 21.03.1969, under Section 106 of Transfer of Property Act, 1882. By said notice, according to the plaintiff, tenancy of defendant stood terminated on 31.04.1969 but since he failed to vacate the premises, civil suit No. 38 of 1969 was instituted by the plaintiff before the trial court for recover of arrears of rent, mesne profits and eviction of the defendant from the shop in question.

4. The defendant contested the suit but admitted that he is tenant of the plaintiff in the shop in question. It is pleaded in the written statement that defendant entered into tenancy in the year 1955, on rent at the rate of Rs. 30/- per month but since the house got damaged in a fire, the landlord renovated the shop in question. After renovation, the rate of rent of Rs. 50/- per month is not denied. However, it is pleaded in the written statement that U.P. (Temporary) Control of Rent and Eviction Act, 1947, was applicable to the building and the tenancy did not stood terminated by the notice sent on behalf of the plaintiff.

5. The trial court after perusing the pleadings, framed following issues:-

1. *Whether U.P. (Temporary) Control of Rent and Eviction Act, 1947 was applicable to the accommodation in suit?*
2. *Whether notice served by the plaintiff is invalid?*
3. *Whether notice under Section 106 of Transfer of Property Act, 1882 stood waived, as alleged by the defendant?*
4. *What amount of arrears of rent and mesne profits is plaintiff entitled to recover from the defendant?*
6. *To what relief, if any, is the plaintiff entitled?*

6. After recording the evidence of the parties and hearing them, the trial court, vide its earlier judgment

and order dated 26.08.1970, decided issue No. 1 in affirmative, holding that the provisions of U.P. (Temporary) Control of Rent and Eviction Act, 1947, were applicable to the shop in question. By said judgment and decree dated 26.08.1970, issue No. 2 was decided against the defendant, as it was not pressed by him. The trial court further held that notice under Section 106 of Transfer of Property Act, 1882, was not waived by the plaintiff. As such issue No.3 was also decided in negative. In view of the finding of issue No.1, the trail court decided issue No. 4 and 5 against the plaintiff, holding that he is not entitled to decree of ejectment of the defendant. However, the plaintiff was permitted to withdraw the amount of rent deposited by the defendant in the court. Against said judgment and order dated 26.08.1970, civil appeal No. 27 of 1970, was preferred by the plaintiff and after haring the parties, the then Ist Civil and Sessions Judge, Kumaon Division, allowed the appeal on 29.11.1971 and decreed the suit for ejectment and for arrears of rent against the defendant with costs. The said appellate court, in its judgment dated 29.11.1971, reversed the finding of the trail court, holding that shop in question was totally a new construction after getting sanctioned the map from the Municipal Board, as such the U.P. (Temporary) Control of Rent and Eviction Act, 1947, was inapplicable to the building in question.

7. It appears from the record that in that first round of litigation, aggrieved by said judgment and decree of the first appellate court, the defendant Durga Datt Joshi, preferred Second Appeal No. 3042 of 1971 before the Allahabad High Court on 15.01.1979. In said Second Appeal (No. 3042 of 1971), the only point pressed before the High Court was that in view of coming into force of new rent control law, defendant is not liable to be ejected from the shop in question in the light of Section 39 of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (herein after referred as U.P. Act No.13 of 1972). While making said submission before the Allahabad High Court, it was pleaded that the defendant had made necessary deposits, as required under Section 39 of U.P. Act 13 of 1972. The operative and relevant para of judgment dated 15.01.1979, passed in said Second Appeal is reproduced below:-

"The learned counsel for the parties are agreed that the matter regarding the sufficiency and the stage of deposits allegedly made by the defendant-appellant be looked into by the trial court with notice to the parties. In case, after hearing the parties, the trial court comes to the conclusion that the deposits made by the appellant are in accordance with the terms of section 39 of the U.P. Act XIII of 1972 as laid down by this Court in its various decisions, it shall relieve the appellant from the liability of being evicted from the premises in suit. If the finding is otherwise, the

decree for ejectment of the defendant-appellant from the premises in suit shall stand affirmed. The appeal stands disposed of accordingly. Parties shall bear their own costs.

Dated 15.01.1979 *Sd/-V.K. Mehrotra".*

8. The trial court examined the issue, as directed by the High Court and after recording the evidence on said point and hearing the parties, found that the deposits made by the defendant were less than required to be made under Section 39 of U.P Act 13 of 1972 and accordingly passed judgment and order dated 17.03.1989 that in view of non fulfillment of requirement under Section 39 of U.P. Act 13 for 1972, the suit stands decreed, as directed on 29.11.1971 by Ist Appellate Court in Civil Appeal No. 27 of 1970. Against this judgment and order dated 17.03.1989, treating the same to be a decree passed by the trial court, the defendant preferred against it, civil appeal No. 07 of 1989, which was decided by the learned Civil Judge, Almora on 12.09.1989, whereby the appeal was allowed holding that the deposits made by the defendant are sufficient in compliance of provisions of Section 39 of U.P. Act 13 of 1972. By said judgment and order dated 12.09.1989, passed in civil appeal No. 07 for 1989, the first appellate court, dismissed the suit for eviction. Aggrieved by that judgment and decree, this second appeal has been preferred by the plaintiff before Allahabad High Court in the year 1989 from where it was received by

transfer under Section 35 of U.P. Reorganisation Act, 2000, for its disposal.

9. The appeal was admitted on 28.11.1989 by Allahabad High Court on following substantial question of law:-

Whether no appeal was maintainable before First Appellate Court under Section 96 of Code of Civil Procedure?

Apart from the above substantial question of law there is another substantial question of law involved in this appeal:-

Whether the respondent was not entitled to the benefit of Section 39 for U.P. Act 13 of 1972?

The said substantial question of law is also raised in the memo of the appeal.

10. Admittedly, plaintiff/appellant is landlord of the shop in question and originally defendant Durga Datt Joshi (since deceased) was the tenant in said shop on rent at the rate of Rs. 50/- per month. The finding as to the fact that the shop in question was constructed in the year 1960 (as the earlier shop in its place got gutted in fire) is also final on the record and not be questioned before this Court. It is also not disputed that the tenancy of defendant Durga Datt Joshi was terminated by servicing him a notice under Section 106 of Transfer of Property Act, 1882, before the suit was instituted for arrears of rent, mesne profits and ejectment of the defendant by the landlord. The suit

was instituted in the year 1969 with the pleading that shop in question being a new construction, provisions of U.P (Temporary) Control of Rent and Eviction Act, 1947 was inapplicable to the building. That finding is also final and not questioned before this Court. However, on 15th of July 1972, U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (U.P. Act No. 13 for 1972) came into force whereby U.P. (Temporary) Control of Rent and Eviction Act, 1947 was repealed. Section 39 of U.P. Act 13 of 1972 provides that in the pending suits on the date of commencement of said Act if the tenant makes deposits of entire rent, damages along with interest and cost of the suit, decree of eviction shall not be passed against such tenant. Section 39 of said Act No. 13 of 1972, reads as under:-

"39. Pending suits for eviction relating to buildings brought under regulation for the first time- *In any suit for eviction of a tenant from any building to which the old Act did not apply, pending on the date of commencement of this Act, where the tenant within one month from such date of commencement or from the date of his knowledge of the pendency of the suit, whichever be later, deposits in the Court before which the suit is pending, the entire amount of rent and damages for use and occupation (such damages for use and occupation being calculated at the same rate as rent) together with interest thereon at the rate of nine per cent per annum and the landlord's full cost of the suit, no decree for the eviction shall be passed*

except on any of the grounds mentioned in the proviso to sub-section (1) or in clauses (b) to (g) of sub-section (2) of Section 20, and the parties shall be entitled to make necessary amendment in their pleadings and to adduce additional evidence where necessary:

Provided that a tenant the rent payable by whom does not exceed twenty-five rupees per month need not deposit any interest as aforesaid."

11. The argument of protection being available to the tenant was raised for the first time by the defendant before the Allahabad High Court in Second Appeal No. 3042 of 1971, as mentioned earlier in this judgment. On the basis of said contention by order dated 15.01.1979, Allahabad High Court sent the matter back to the trail court only for the purpose of examination that whether or not the deposits are made, as required under Section 39 of U.P. Act, 13, 1972. In that order (operative portion of the order quoted above), it is made clear that if the deposit was not found to be in accordance with Section 39 of U.P. Act 13 of 1972, the decree and judgment of Ist appellate court would stand affirmed. The trial court, vide its judgment and order dated 17.03.1989, held that the deposits are not sufficient to comply with the provisions of Section 39 of U.P. Act 13 of 1972 and directed that the suit stands decreed, as per the first appellate court's order dated 29.11.1971 in civil appeal No. 27 of 1970 against the defendant for

arrears of rent, mesne profits and ejectment. However, civil appeal No. 07 of 1989 was preferred by the defendant, which was disposed of by judgment and order dated 12.09.1989 (impugned judgment and decree) in which judgment and order passed by the trial court on 17.03.1989 was set aside on the ground that deposits made by the defendant were sufficient to comply with the provisions of Section 39 of U.P. Act 13 of 1972. After going through the entire record of the trial court and that of the first appellate court, this Court found that the impugned judgment and order dated 12.09.1989 is not only erroneous in fact but also in law. The finding as to the sufficiency of deposits in favour of the defendant is totally perverse. What Section 39 provides is that the defendant should within one month from date of commencement of the Act in a pending suit would make necessary deposits of entire rent due to the damages, interest thereon at the rate of 9% and cost of the suit. There is neither any amendment in the written statement, raising the plea of objection under Section 39 on the record nor in deposits made within one month of the commencement of the Act to fulfill the requirement of Section 39 of U.P. Act 13 of 1972. What the first appellate court has taken into consideration is the deposits made earlier in the form of civil deposits during the pendency of the suit and held that the deposits are more than the deposits, required to be made under Section 39 of U.P. Act 13 of 1972. Neither the first appellate court has considered that

what was the court fee paid by the plaintiff nor had it considered what were the expenses of the cost of execution, which was already pending during the pendency of second appeal. Not only this, the first appellate court has further committed error of law totally ignoring the interest payable on the rent due. From the evidence on record it appears that the deposits of the rent were made by the defendant between 1969 and 1972 through the chalan receipts- paper No. 98C/1. paper no. 98C/2, paper No. 98C/3 and paper No. 98C/4. these deposits made, are to the tune of Rs. 2257.75. Adding the deposits made, thereafter the first appellate court found that in all Rs. 2757.75 were deposited by the defendant, which is in excess of the amount due from the defendant by Rs. 264.75. The finding of the first appellate court is perverse for the reason that the trail court has categorically mentioned that the amount deposited vide chalan (paper No. 98C/1, paper No. 98C/2, paper No. 98C/3 and paper No. 98C/4) were withdrawn later on by the defendant himself. The details of the amount withdrawn by the defendant (tenant) himself are contained in paper No. 94 C. There is no evidence in record to deny this fact. As such, the first appellate court has committed grave error of law in holding that the defendant stood protected from the decree of ejectment under Section 39 of U.P. Act 13 of 1972.

12. Now I come to another substantial question of law raised by the plaintiff that the order dated 17.03.1989, passed by the trail court was not a decree and as such no appeal under Section 96 of Code of Civil Procedure, 1908, was maintainable against it before first appellate court. To examine this issue, it is necessary to see the definition of word "decree", as contained in the Code. Sub-section (2) of Section 2 defines decree as under:-

"(2) 'decree' means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include-

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation-……."

From the above definition of decree, it is clear that even a formal expression of adjudication in a single matter in controversy in the suit is covered within the definition of decree, as such, the first appellate court committed no error of law by entertaining the civil appeal No. 07 of 1989, which was maintainable before said court by Civil Judge, Almora.

13. For the reasons as discussed above in para 11, this second appeal is allowed. The judgment and order dated 12.09.1989, passed in civil appeal No. 07 of 1989 by the first appellate court is set aside. By judgment and decree passed by the Allahabad High Court in Second Appeal No. 3042 of 1971 by the first appellate court in civil appeal No. 27 for 1970 dated 29.11.1971 fro arrears of rent, mesne profits and ejectment against the defendant, stands affirmed. As the deposits made by the defendant within one month of commencement of Act No. 13 of 1972, were insufficient to protect him under Section 39 of said Act. The respondent is directed to vacate the shop in question within a period of three months from today, failing which the decree passed by first appellate court vide order dated 29.11.1971, passed in civil appeal No. 27 for 1970, for ejectment shall be executed.

(Prafulla C. Pant, J.)

Dt: 07.08.2006
Sweta